

Security-2

26 June 1958

## MEMORANDUM FOR THE RECORD

SUBJECT: Law Review Article on Confrontation in Security Proceedings

1. The March 1958 issue of the Notre Dame Lawyer contains an article entitled "Confrontation by Witnesses in Government Employee Security Proceedings" by Jan Z. Krasnowiecki, a member of the Illinois Bar. The author reviews the case law including early English and American cases involving the separation of Government employees and interprets these cases to mean that unless an employee is given a hearing as a part of the removal procedure there may be a denial of due process. He also concludes that where a hearing is required, to conform with due process, it must be full and open. An abstract of the article follows.

2. At present civilian employees of the Federal Government are subject to three programs touching security: (1) Executive Order 10450 under Public Law 733 which is a continuation of earlier programs under the Lloyd-LaFollette and Veterans Preference Acts; (2) the Atomic Energy Commission program; and (3) Civil Service regulations. There is not one case which squarely holds that no hearing of any kind need be given to a Government employee who is discharged for a specified cause as against the constitutional objections that he must have a hearing. All of the cases involve attempts by employees to obtain a review of the fact determination by the removing officer and allegations that the opportunity to answer in writing supported by affidavits is insufficient are made, not on constitutional grounds but in order to indicate the weakness of the fact determination attack. The right to a hearing where a removal is for cause, recognized in Shurtleff v. U.S. (189 US 311, 1902) is not of recent origin but dates back to English cases which held that dismissal for a stated cause without a hearing is against "justice and right".

3. Where a Government has power to dismiss at will it will be glad to do so. The trouble in security proceedings has arisen in cases where the Government did not, or thought it did not, have the power to dismiss at will. The restrictive interpretation of the early English cases and the American cases concerning the right to a hearing, affects only those security cases where the Government has mistakenly stated the reason for dismissal when there was no need for it to do so. There appears to be grave doubt as to the constitutionality of the section of the Lloyd-LaFollette Act which states: "No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay."

4. There must be a right to a hearing where the employee contests the truth of the fact inferred itself and this right is not disposed of sub-silentio. It is not disposed of either by saying that after all, if given a hearing, the employee will only continue to refuse to answer the critical question, or to take the oath, as before. An employee may not be discharged for a publicly stated cause without his being afforded a hearing as to the existence of such cause. Where an employee fails to avail himself of the opportunity to introduce evidence on his behalf in opposition to the inference drawn from his refusal to answer there still remains the constitutional impediment that no sinister meaning can be attributed to his silence.

5. If an employee "is terminated in the interests of the United States" there probably would be no constitutional objection to that determination without a hearing. The right to a hearing does not tie the Government's hands as an employer to hire and fire at will. It does, however, prevent the Government from exercising its rights in this respect in such a manner as to permanently and publicly record a serious charge against the employee without giving him an opportunity to defend.

6. The question is not whether an employee about to be discharged as a security risk has a property right in his employment. He has a right to his good standing in the community which ought to be protected under the due process clause of the fifth amendment against arbitrary destruction by the Government. From the earliest days of the common law, Englishmen claimed the right to be accused by others before they be put to answer, and this claim involved the claim to have the accusers brought face to face at trial. They were aware that the right to confrontation was a major guarantee against oppression. What is necessary to support the conclusion that confrontation by witnesses in all cases would endanger national security is a showing that in some cases, at least, it would be impossible to obtain enough testimony from persons other than undercover agents and casual informants who request anonymity to satisfy even the very small quantum of proof required for a security discharge.

7. No conclusion is reached on the question of whether the recognition of an unqualified right to confrontation would endanger national security but there is hope that when the answer to that question is finally undertaken the assumptions that a Government employee has no constitutional claim to a hearing will not be allowed to weigh in the balance against the individual.

STATINTL

Office of General Counsel

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